Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 1037

LEE FINGERS, (styled "L. C. Palmer" otherwise called Henry Palmer and Andrew Clinton in the Courts below),

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

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INDEX

	Page
Reference to Official Report of Opinion in Court Below	2
Statement of Grounds Upon Which Jurisdiction of This Court is Invoked	2
Questions Presented for Review	3
Constitutional and Statutory Provisions Involved in the Case	8
Facts in the Case Material to the Questions Presented and Statement of the Matter in Which the Federal Questions Sought to Be Reviewed Were Raised	9
Argument Amplifying the Reasons Relied on for the Allowance of the Writ	22

List of Authorities

Cases:

Adamson v. People of California, 332 U.S. 46, 67 S. Ct. 1672	36
Agnello, et al v. United States, 269 U.S. 20, 46 S. Ct. 4, 6	30
Boyd v. United States, 116 U.S. 616, 630 (1886)	25
Chapman v. United States, 365 U.S. 610 (1961)	29
Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 369	29
Lyons v. Oklahoma, 64 S. Ct. 1208, 322 U.S. 596, 605	37
Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 4684	22
People v. Deal, 357 Ill. 634, 641	38

People v. Hermens, 5 Ill. 2d 277, 125 N.E. 2nd 500 (1955) 32
Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 41
Thompson v. Louisville, 80 S. Ct. 624, 362 U.S. 199 38
Trupiano v. United States, 334 U.S. 699 (1948) 28
United States v. Lefkovitz, 285 U.S. 452, 464, 52 S. Ct. 420, 423 30

Other Cases Discussed:

People v. Perroni, 14 Ill. 2d 581, 153 N.E. 2d 578 25
United States v. Rabinowitz, 339 U.S. 56 (1950) 29

APPENDICES.

Opinion of Supreme Court of Illinois Sought to be Reviewed 1a
Judgment of Criminal Court of Cook County Sought to be Reversed 9a

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Petition For Writ Of Certiorari To The Supreme Court Of Illinois

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Lee Fingers*, a citizen of the United States of America and resident of the State of Illinois, prays that a Writ of Certiorari issue to the Supreme Court

* Petitioner is misnamed "L. C. Palmer" in the indictment and judgments in the Courts below.

of Illinois to review that Court's judgment of affirmance of the judgment of the Criminal Court of Cook County, Illinois that he is guilty of the crime of burglary committed in Cook County on August 1, 1960, and the sentence of him to imprisonment in the Illinois State Penitentiary for not less than one, nor more than four years.*

Petitioner prays that the judgment of the Illinois Supreme Court and that of the Criminal Court of Cook County may be reversed. In support of his prayer Petitioner shows the following:

A. REFERENCE TO OFFICIAL REPORT OF COURT BELOW.

The opinion of the Supreme Court of Illinois, complained of herein, is reported in 26 Ill. 2nd 464, and 187 N.E. 2nd 236.

B. STATEMENT OF THE GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

(1) The opinion of the Supreme Court of Illinois affirming the judgment of the Criminal Court of Cook County was filed on November 30, 1962. The judgment of the Criminal Court of Cook County was rendered on February 3, 1961.

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* Judgment of Illinois Supreme Court entered on November 30, 1962 and judgment of Criminal Court of Cook County entered on February 3, 1961 are set out below herein as Appendix 1 and Appendix 2 respectively.

(2) A Petition for Rehearing was filed in the Illinois Supreme Court on December 12, 1962 and denied on January 28, 1963.

(3) The statutory provisions conferring jurisdiction upon this Court to review the judgment of the Illinois Supreme Court, the highest Court of the State of Illinois, by way of Writ of Certiorari, are found in Section 1257, Title 28, United States Code Annotated. The particular portion of said Section 1257 under which jurisdiction of this Court is invoked is as follows:

> "* * * Where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

Petitioner's claim is that the courts below admitted evidence obtained by a search and seizure in violation of the Fourth Amendment to the United States Constitution and convicted him upon that illegal evidence and none other, or upon that illegal evidence and the uncorroborated testimony of an alleged accomplice some of which testimony was unlawful, and all of which testimony was completely incredible by any standard, and contradicted by unimpeached testimony, all in violation of the guarantees and prohibitions of the Fourteenth Amendment to the United States Constitution.

C QUESTIONS PRESENTED FOR REVIEW

1. Can a tenant who resides in an apartment with his landlord waive the landlord's right to object to the entry into, search of, and seizure of property from the apartment without a warrant authorizing same?

2. If a tenant who lives in an apartment with his landlord permits police officers to enter the apartment with-

out a warrant to search it or seize property therein, and the police officers search the apartment and seize property therefrom not belonging to the tenant, should evidence of the discovery of the seized property be suppressed and excluded on the landlord's motion at a subsequent criminal trial of the landlord where evidence concerning the seized property is sought to be introduced to establish the landlord's connection with a crime charged against him?

3. Is the search of a private dwelling without a warrant in itself unreasonable and abhorrent to our laws as held in *Agnello* v. *United States*, 269 U.S. 20, 46 S. Ct. 4?

4. What significance is attached by this Court to the time police officers had to obtain a warrant to search a private dwelling? Are the opinions in *Trupiano* v. *United States*, 334 U.S. 699, *Chapman* v. *United States*, 365 U.S. 610, and *Johnson* v. *United States*, 333 U.S. 10, which attach great significance to the failure of officers to obtain warrants for the search of fixed premises although they had ample time to do so, correct expressions of the attitude of this Court, or is the opinion in *United States* v. *Rabinowitz*, 339 U.S. 56, that officers are not bound to obtain a search warrant, even if there was time, if the seizure was otherwise reasonable the correct expression of the attitude of this Court?

5. Does the fact that *Rabinowitz* was concerned with a seizure without warrant after a lawful arrest distinguish that case from the instant case so as to require a different rule as to reasonableness of a search and seizure of fixed premises without a warrant where no excuse appears for the failure to secure a warrant before the search of a private dwelling?

6. Can a police officer with fellow officers some of whom are in uniform, and all presumably armed, successfully maintain that their entry into a private dwelling is consented to where they exhibited their badges and asked the occupant of the dwelling if they had permission to enter and the occupant said yes and opened a door and admitted them?

7. Does the consent of the occupant of a private dwelling that police officers may enter confer upon the officers the right to search the dwelling and seize property therefrom, and is the search and seizure thereby rendered reasonable within the meaning of the Fourth Amendment?

8. Assuming that a hearing of a motion to suppress evidence is properly conducted along with a trial of the cause on the merits, is the trial court's order denying the motion to suppress at the close of the State's case and before any evidence of defendant is offered, premature? And, since the decision in *Mapp* v. *Ohio*, 367 U.S. 643; 81 S. Ct. 1684, does not the prematurity of the trial court's ruling on the motion to suppress become a subject for the consideration of this Court as to whether or not the premature ruling improperly permitted the admission of evidence obtained in violation of the prohibition of the Fourth Amendment?

9. Did the evidence received by the trial court before it denied the motion to suppress evidence establish that the entry into, search of and seizure from petitioner's apartment was reasonable within the meaning of the Fourth Amendment, and that therefore the evidence obtained as a result of the entry, search and seizure was admissible as outside the prohibition of the due process clause of the Fourteenth Amendment?

10. Is the Illinois rule that the uncorroborated testimony of an alleged accomplice of a defendant is sufficient to sustain a conviction in a criminal case so unfair that the rule should be abrogated by this court as violative of the due process clause of the Fourteenth Amendment?

11. Does the fact that a large number of American jurisdictions have abandoned the common law rule that uncorroborated accomplice testimony may be sufficient to sustain a conviction have any bearing upon the fairness of the rule, and should not this court render some opinion as to its fairness in the interest of uniformity of justice and fair play in criminal trials throughout the several states?

12. Where the conviction of a defendant rests solely upon the uncorroborated testimony of an alleged accomplice who admits anger toward defendant, and who is several times a convicted felon, a narcotic addict and demonstrable liar, and where his testimony against defendant is contradicted by another witness whom he testified was another accomplice at an important stage of the criminal transaction, and where his testimony is materially self-contradictory, unreasonable and impossible in its several parts, and where the defendant establishes an alibi by unimpeached testimony of himself and another witness, which alibi is corroborated by a third witness, and where the trial judge unnecessarily elicits from the accomplice witness testifying against defendant testimony concerning alleged prior unrelated criminal transactions with defendant who possesses an unblemished record, is the conviction amenable to nullification by this Court as so unfairly obtained that it violates the due process clause of the Fourteenth Amendment?

13. Can a state court of review observe the canons of decency and fair play required by the Fourteenth Amendment where a defendant's appeal is that the judge misjudged the evidence when it refuses to consider questions of credibility of witnesses and the weight to be given their testimony simply because the trial judge heard the witnesses and saw them?

14. Is the unrealistic suggestion of the Illinois Supreme Court that evidence of alleged unrelated crimes of a defendant might prejudice a jury but probably not a judge, amenable to correction by this Court by exercise of its power under the Fourteenth Amendment?

15. Is the due process clause of the Fourteenth Amendment satisfied where testimony of state's witnesses is taken on a motion to suppress evidence, and after the interruption of several days the hearing is resumed but the prosecutor announces to the Court that the proceeding is on the motion and the trial of cause at the same time, where there was no stipulation or agreement on the date the hearing was begun or afterward that the proceedings were upon the motion and trial concomitantly, where the evidence taken after the State's attorney's announcement of conjoined proceeding clearly does not of itself establish defendant's guilt, and where the case was never called to trial on the merits and no formal trial was had?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE.

Fourteenth Amendment to United States Constitution, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth Amendment to United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 64, Chapter 38, Illinois Revised Statutes, (1959).

(Section 38, Division 1, Criminal Code of Illinois)

> Whoever wilfully and maliciously and forcibly breaks and enters, or wilfully and maliciously, without force (the doors or windows being open), enters into any dwelling house, kitchen, office, shop, store-house, ware-house, malt-house, mill, pottery, factory, wharf-craft, steam-boat, or other water craft, freight or passenger railroad car, church, meeting house, school house or other building with intent to commit murder, robbery, rape, mayhem, or other felony or larceny shall be deemed guilty of burglary and be imprisoned in the penitentiary for any term of years not less than one or for life.
>
> (As amended by act approved July 6, 1927—1. 1927, Page 398).

E. FACTS IN THE CASE MATERIAL TO THE QUESTIONS PRESENTED AND STATEMENT OF THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

1. Facts.

A Cook County Grand Jury charged, in an indictment (No. 60-3578) that Nathaniel Yancey, one Ricardo Freeman, one L. C. Palmer, otherwise called Henry Palmer, otherwise called Andrew Clinton, on August 1, 1960, in Cook County, Illinois, feloniously, burglariously, etc., broke and entered the office of Monroe Calculating Machine Company, Inc., a Corporation with intent to steal property of said Corporation located in a factory, and did steal, take and carry away twenty adding machines each of the value of $225.00 being found in said building. (A. 1)*

The above charge is made in Count One of the Indictment. Count Two charges that the same persons burglarized the property of the said Corporation on the same date, but without forcible entry. Count Three charges that they unlawfully bought and received twenty adding machines belonging to the said Corporation that had been stolen from the Corporation by Nathaniel Yancey, Ricardo Freeman and L. C. Palmer, knowing the same to have been stolen. The finding and judgment of the Criminal Court of Cook County, after a trial before the Court, without a Jury, is that L. C. Palmer is guilty of burglary in manner and form as charged in the indictment.

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* "(A. 1)" refers to page of printed Abstract of Trial Court Record used in Supreme Court of Illinois. The Abstract is included on page 3 of the Record of the Supreme Court of Illinois filed with this Petition.

Petitioner, Lee Fingers, was arrested, brought before the Court, tried and convicted as L. C. Palmer, although he denied that his name was L. C. Palmer or any of the other names in the indictment and denied that he had ever been known by any of said names. (A. 19).

According to Robert C. Sherman, a Chicago Police Officer, about 2:30 A.M. on August 2, 1960, he stopped a taxicab being driven by a Wesley Howell, and in which a Nathaniel Yancey was a passenger, and found four calculating or adding machines on the floor. He took Yancey, Howell and the machines into the police station (A. 19) About 1:30 A.M. on August 3, 1960, he and other officers went to a building where the name L. C. Palmer appeared on the door or bell. They were admitted into an apartment in the building by a Herman Twillie, and observed an adding machine in a shopping bag on the living room floor. They arrested Twillie and a man known to them as Ricardo Fleming. A Mr. Rossell observed all five machines.* At the time the officers were admitted into the apartment by Twillie, he stated that he was renting part of the apartment from Palmer (A. 30).

Petitioner Fingers was not at home at the time the machine was found in his apartment. (A. 21).

Two witnesses, both of whom were described as accomplices in the burglary and in the purported delivery of the stolen machines to Petitioner's home, gave completely contradictory accounts of what transpired. One of these witnesses, Nathaniel Yancey, gave testimony for the People

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* Mr. Russell is Calvin Russell, Manager of Monroe Calculating Machine Company whose premises were allegedly burglarized.

of the State of Illinois (A. 11) and the other witness, Ricardo Freeman, gave testimony for Petitioner Fingers (A. 36). According to Yancey, on August 1, 1950 he had a conversation with Petitioner at Petitioner's apartment. (Yancey throughout all his testimony referred to Petitioner as "Palmer"). Petitioner said to him "how about getting some adding machines." Yancey said "all right," and Petitioner told him to go to Monroe Adding Machine Company and get some machines. Petitioner told him that the door was open. This was Two O'Clock in the morning. Petitioner drove Yancey to Monroe Calculating Machine Company in Petitioner's automobile and Yancey went into the place, took twenty adding machines and loaded them in Petitioner's automobile. Petitioner was in the car or a restaurant at this time. Petitioner then drove him and the machines to Petitioner's house. Petitioner procured Ricardo to help take the machines into the house, and Petitioner, Ricardo and Yancey carried all but three of the machines into Petitioner's house. Yancey was supposed to get Five Hundred ($500.00) Dollars the next day but never got the money. After taking the machines into Petitioner's house Yancey hailed a taxicab and was arrested therein with the three adding machines he had kept for himself. All this appears in Yancey's testimony on direct examination by the State's Attorney.

On cross examination by Petitioner's Attorney, Yancey testified that he had testified before another Judge at his own trial for the theft of the machines, that he had had four machines in the cab. (A. 13). He testified that on July 31st he had gone into the premises of Monroe Calculating Machine Company and "cased the joint" and that at this time he was alone. Petitioner was not with him on that day. (A. 13). The first time he ever discussed adding

machines with Petitioner was August 1st in the morning. (A. 13-14). He then testified that in the day time on the First that he went to the Monroe Calculating Machine Company after Palmer told him he needed some adding machines and knew a place down town (A. 14). Yancey further testified that he took some of the twenty machines because he didn't get money promised for them. (A. 14). Yancey said that after his arrest he had asked Petitioner for money but Petitioner did not say anything. Yancey was not released on bail. Yancey also testified that he had not seen Petitioner from the time he, Yancey, was arrested on August 3, 1960 until the date Petitioner's trial began. (A. 17) Petitioner had sent a lawyer to represent "Fleming," but did not send a lawyer to represent Yancey. He had hidden the machines he was going to keep in an alley before he hailed the taxicab. At the time of his arrest he was a narcotic addict. (A. 16). At the time of his arrest Yancey did not tell the police officers that Petitioner was involved nor did he tell the police that Fleming was involved (A. 18).

During the cross examination of Yancey the following questions and answers appear:

Q. But you trusted L. C. for his $500.00?

A. Trust him.

Q. Why?

A. I have been doing business with him for four years. (Tr. Ct. Rec. 109)*

* This reference is to page of transcript of Record of the Trial Court filed in Supreme Court.

Near the end of the cross examination of Yancey the following appears:

The Court: Q. You said you had known this man how long?

A. About four years.

Q. You said you had done business with him before

A. Yes sir.

Q. What kind?

A. Bought all kind of merchandise.

Q. What do you mean by that?

A. Hot merchandise coats, camera, everything he could get. (Tr. Ct. Rec. 122)

Later in a further direct examination of Yancey by the State's Attorney the following questions, answers and colloquy appear:

Mr. Winsberg: Q. Have you had occasion to do business with the Defendant?

The Witness: A. I have.

Mr. Moran: Object to the term business, your honor.

The Court: Well, business at this point is very innocuous. Objection overruled.

Mr. Winsberg: Q. Have you had occasion to give him merchandise and receive in exchange money?

Mr. Moran: Objection.

The Court: No evidence—this is allegedly a business transaction. Your objection is overruled.

Mr. Winsberg: Q. Have you had occasion to give him merchandise and receive from him money?

The Witness: A. I have.

Q. How many times had you had occasion to transact this type of transaction with the Defendant?

A. Maybe twice a month.
Q. For a period of how many years?
A. For three years.

On further cross examination by Petitioner's lawyer after the further direct examination by the State's Attorney, Yancey stated that he had told the police officers that Freeman and the Petitioner were with him in the burglary all the way (Tr. Ct. Rec. 157). Robert C. Sherman, the police officer, had testified that at the trial of Yancey he had testified that Yancey had told him that he committed the burglary and that Ricardo Freeman was with him and "was in all the way" and that Petitioner was involved in the participation of the burglary with him (A. 29). He testified just before that the only thing Freeman did was to take the stuff out of the car (Tr. Ct. Rec. 156). At the time of his testimony Yancey was an inmate of the Illinois State Penitentiary serving a term of one year to thirteen months having pleaded guilty to taking the four machines. Ricardo Freeman and Yancey had been in jail together in 1957 (Tr. Ct. Rec. 155-156).

Ricardo Freeman, the other alleged accomplice, testified that on August 1, 1960, Yancey had come to his home and asked him to help him move some machines. He had walked to the rear of the building where Petitioner's apartment is located and had seen a taxicab in which there were about seven or eight machines (A. 36). Freeman lived only three or four doors from Petitioner. Yancey agreed to pay him five dollars for the help but had only a one hundred dollar bill. Freeman took one machine and placed it on the stairway at the rear of the building. When he returned to the taxi Yancey said that he was not going to move any more of the machines and that he would bring the five dollars

the next day. On the next day he was in Petitioner's house with a friend of his and one Herman Twillie, who lived there. He was arrested when he left the house and was charged with and pleaded guilty to petty larceny or petty receiving because of the machine found in Petitioner's apartment. Petitioner was not in the alley at the time of his transactions with Yancey on that first day of August and he was not in his apartment on that day. Freeman did not participate in the commission of a burglary of the adding machine company.

Petitioner, testifying in his own behalf (A. 34), denied that he had participated in the burglary of Monroe Calculating Machine Company, and testified that he had left Chicago on the Thursday before August 1, 1960 and driven to Idlewild, Michigan, and that he had met his girl friend, named Shirley, and remained there continuously until returning to Chicago on August 3, 1960. He denied ever being known as L. C. Palmer or Andrew Clinton and stated that his name was Lee Fingers, and that he was known only by that name. He testified that in November, 1958, he had had an altercation with Yancey in a tavern that he owned and had kicked him out.

Shirley Clinton testified that she had seen Petitioner in Idlewild, Michigan, on the 29th and every day following, including August 1st and that she and Petitioner and two friends returned to Chicago on August 3, 1960 (A. 32). She testified Petitioner had been in Idlewild, Michigan continuously from the 29th to 3rd of August.

Herman Twillie testified that he lived in the apartment of the Petitioner on August 1, 1960 and that he did not recall ever seeing Yancey there. He testified that Petitioner was not in the apartment on August 1st or 2nd and that he did not see him until after August 2nd.

Before trial began Petitioner's Attorney filed a Motion to Suppress as evidence the machine allegedly found by Officer Sherman and his colleagues in Petitioner's apartment (Tr. Ct. Rec. 63). He stated to the Court at that time that Petitioner's name was L. C. Fingers and not L. C. Palmer and that Palmer was not an alias. He filed his Motion To Suppress Evidence under the name of Fingers. Petition in Support of Motion to Suppress Evidence appears on page 18 of Trial Court Record and page 3 of the Abstract. Nowhere does it appear that a hearing was had of said Motion. Hearing on the Motion to Suppress began on January 19, 1961 (Tr. Ct. Rec. 61) (A. 4). On this date the testimony of one Calvin Rossell, the manager of the calculating machine company, was taken and his testimony was only that on August 2nd he had discovered his premises had been burglarized, and that it was subsequently discovered from a check of his inventory that twenty machines were missing. He admitted that there had been prior thefts. And on the same day the testimony of Nathaniel Yancey and Police Officer Sherman was offered and received by the Court the hearing on the Motion to Suppress Evidence was continued to January 25, 1961 for further testimony (Tr. Ct. Rec. 19, 135) (A. 4).

On January 25, 1961 the cause was continued to February 1, 1961, and on February 2, 1961 proceedings before the Court were resumed. The Court asked "We are proceeding on the motion to suppress, is that it? The State's Attorney said "Both, trying it at the same time" (Tr. Ct. Rec. 139). Further direct examination of Nathaniel Yancey was heard, as well as further direct examination of Police Officer Robert C. Sherman (Tr. Ct. Rec. 140, 166). There was also further cross examination of these witnesses. At this point on February 2, 1961 the Court en-

tered an order denying defendant's motion to suppress evidence (Tr. Ct. Rec. 178). Also on February 2, 1961 on the same day the Defendant's case began and the testimony of Herman Twillie, Shirley Clinton and Petitioner Fingers was heard by the Court (Tr. Ct. Rec. 179, 189, 200). The cause was continued to February 3, 1961 (Tr. Ct. Rec. 212) (A. 4). On February 3, 1961 the testimony of Ricardo Freeman for Defendant and that of Police Officer Robert C. Sherman in rebuttal was heard by the Court and the Court rendered his finding (Tr. Ct. Rec. 214, 226, 230) (A. 4).

In the meantime on February 2, 1961, the Court entered an Order denying Defendant's Motion to Suppress Evidence (A. 4).

The Court rendered his finding as follows:

> "I can see no differences as far as Yancey at this time telling the story he is telling now and he told the police at the time. Yancey's story is corroborated by this machine, according to Freeman was last left on a back steps of this apartment but it winds up in the apartment that Fingers or Palmer lived in. And certainly Yancey didn't take it in there because he took off in the cab. Yancey, unless it had happened as he said it happened, as he told the police it happened, would have no idea this machine would be in Palmer's apartment. Palmer was up in Michigan.
>
> The Court finds the Defendant, L. C. Palmer, guilty of burglary in manner and form as charged in the indictment." (Tr. Ct. Rec. 230).

2. Manner In Which Federal Questions Were Raised.

Petitioner raised the question of the unlawful and unreasonable search of his home in the trial court by motion to suppress as evidence, the property found and seized

during the search. He pleaded that the search and seizure were violative of the prohibition of the Fourth Amendment to the United States Constitution, against unreasonable search and seizure.

This federal question was again raised in his Brief and Argument filed in the Supreme Court of Illinois. The trial court overruled his motion to suppress and the Supreme Court held that the search of his home was not unlawful and the motion had been properly overruled.

Petitioner in his petition for rehearing asked the Supreme Court to change its ruling that the motion to suppress was properly overruled. The petition was denied. (Sup. Ct. Rec. 13, 14)*

The questions of whether or not there was an actual trial of petitioner in the trial court, of whether or not any evidence was adduced at the trial of him in the trial court, and the question of whether or not he was deprived of his liberty without due process of law contrary to the guaranty of the Fourteenth Amendment to the United States Constitution because he was not tried and no evidence was adduced to sustain the finding and judgment at a trial as the word trial is traditionally understood, and, as a trial is inapposite to and different from a hearing of a motion to suppress evidence, were not directly raised in the courts below. However, all these questions were indirectly raised by petitioner's motion to suppress evidence, the hearing on the motion, and petitioner's contentions in Supreme Court of Illinois that his motion to suppress evidence al-

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* Refers to page of Record of Supreme Court of Illinois filed with this Petition.

legedly unlawfully obtained was wrongfully denied. If the trial court considered evidence adduced at the hearing to determine the lawfulness of the search of petitioner's home also as evidence adduced at the trial of him, or *vice versa*, then the trial court could not properly deny petitioner's motion to suppress evidence until all of the evidence in the case was heard, and it was error to deny the motion at the close of the State's case. Any consideration by this court of the propriety of rulings of the courts below on the motion to suppress evidence necessitates and compels a determination by this court of whether or not the "State's case" constituted only a hearing of a motion to suppress evidence and whether or not any evidence was offered and received against petitioner at a trial, and whether or not the motion to suppress and the trial were in fact and law conducted concomitantly.

In the trial court petitioner moved for a finding of not guilty after the State's Attorney said "That is the State's case." (Tr. Ct. Rec. 177) He argued that the only evidence linking petitioner to the burglary was the testimony of Yancey and that that testimony contained many discrepancies. (Tr. Ct. Rec. 177) In this manner petitioner raised the question of the sufficiency as a matter of law of uncorroborated testimony of an accomplice witness to sustain a conviction in a criminal case—especially where that testimony is contradictory in parts. The trial court overruled his motion. In the Supreme Court of Illinois petitioner urged that the uncorroborated testimony of alleged accomplice Yancey was not sufficient to establish his guilt beyond a reasonable doubt, and urged that his trial had been unfair because of the reception of testimony about the machine allegedly found in his apartment without a scintilla of evidence connecting it with the alleged

burglary, the elicitation by the court of testimony from Yancey about purported prior disconnected criminal transactions between him and petitioner, the reception of hearsay evidence prejudicial to petitioner and the reception of testimony about what the police discovered during their unlawful search of petitioner's home. The Illinois Supreme Court held that:

1. The uncorroborated testimony of Yancey was sufficient to sustain the finding of petitioner's guilt, and that it could not be said that it was so unsatisfactory as to justify a reasonable doubt.

2. The motion to suppress was properly overruled because the searching officers were admitted by Twillie, a tenant of petitioner and the machine was found "in the living room, a room of common usage."

3. The interrogation by the court regarding unrelated crimes was not prejudicial to petitioner because what might prejudice a jury need not prejudice a judge and, besides, the petitioner had "opened the door" for this line of interrogation by the judge during his own cross examination of Yancey.

4. There was "a connected chain of testimony from State's witnesses as to the machines found in Yancey's possession and the machine found in defendant's possession."

The court found that the trial was fair. In his petition for rehearing filed in the Illinois Supreme Court, petitioner pointed out the misapprehensions of the record committed by the court in forming its holdings and asserted that the opinion constituted and permitted a denial of due process guaranteed by the Federal Constitution and that

violence was done to the "Anglo-Saxon understanding of fair play." Prior to the filing of the Opinion of the Illinois Supreme Court petitioner could not raise the question that it would be so unfair that this Court should exercise its power under the Fourteenth Amendment to correct a denial of the due process by that Court.

F. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1.

That the introduction of evidence in a State criminal trial, which evidence had been obtained by unlawful search and seizure in violation of the prohibition of the Fourth Amendment to the United States Constitution, constitutes a denial of due process guaranteed by the Fourteenth Amendment to said Constitution is well settled. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684.

As already shown the Police Officers entered Petitioner's apartment without a Warrant authorizing the entry and search thereof, and found and took therefrom an adding machine. At petitioner's trial testimony was received by the Court about the machine and its said discovery. The trial court relied upon the testimony concerning this machine as corroboration of the testimony of the accomplice witness Yancey. (Tr. Ct. Rec. 177) The conviction of petitioner rests solely and wholly upon the testimony of Yancey.

Petitioner had moved to suppress the machine as evidence and the trial court properly ordered proceedings to begin on the said preliminary motion (Tr. Ct. Rec. 62). It is patently clear that on the first day of the hearing, January 19, 1961, at the time testimony was heard from the witness, Calvin Rossell, and the first testimony of the witnesses Nathaniel Yancey and Police Officer Sherman was offered and received, the judge intended and presumed that he was hearing testimony on the Motion to Suppress Evidence proceedings on which were then and there being conducted before him. Not only had the judge ordered a hearing on the Motion to Suppress to begin, but also, at the

end of that first day, he entered an Order that the hearing on the Motion to Suppress Evidence was continued to January 25, 1961. It was just before the resumption of the proceedings on the second day that testimony was offered and received, that the State's Attorney advised the Court that he was proceeding upon the Motion to Suppress Evidence and trial of the case at the same time. For purpose of argument at this point, we will assume, but not admit, that all of the testimony offered and received up to the time that the Court denied the Motion to Suppress Evidence on the second day of hearing, was offered and received by the Court on both the Motion to Suppress Evidence and the trial on the merits at the same time. Of all this said testimony, that which relates to the reasonableness or unreasonableness of the entry into and search of and seizure from Petitioner's home on August 3, 1960, is found only in the testimony of Police Officer Sherman (A. 19). (Tr. Ct. Rec. 123). Neither Yancey nor Rossell had given one scintilla of testimony concerning the surrounding circumstances and facts of the entry and search and seizure, nor did either testify that any information had been given the Police Officers which would justify the entry, search and seizure without a Warrant, nor was there, during the questioning of them, any attempt to elicit testimony which might justify the search and seizure as reasonable.

Officer Sherman's testimony concerning the entry, search and seizure is as follows: At 1:30 o'clock on the morning of August 3, 1960, he had seen one Ricardo Fleming leave the entrance to a building. He and his fellow officers accosted Fleming, demanded his identification, and asked him where he came from. Fleming said that he came from Petitioner's apartment. They, with Fleming, went

to Petitioner's apartment and Fleming called to a man named Herman Twillie and asked him to let them in. Twillie came down and admitted them into the entrance. The Officers identified themselves with stars and at least two of them were in policemen's uniforms. They asked Twillie if they had permission to come into the home. He said yes. They entered and found the adding machine (A. 19-20). The Officer testified that Twillie paid part of the rent of the apartment (A. 22). Later the Officer stated he searched the apartment fully. Twillie had told him he resided there (A. 27-28). The apartment consisted of living room, bed room, bath room, dining room and kitchen, and that Mr. Twillie's bed room was off a hallway. (A. 28).

The Illinois Supreme Court justified the unwarranted entry into, and search of and seizure from Petitioner's apartment on the following grounds:

(1) The Police Officers did not "break into" the apartment.

(2) The Police Officers were admitted by Twillie who was a tenant of Petitioner.

(3) The evidence was found in the living-room "a room of common usage." (A. 1)

(4) There does not, and should not, exist a requirement that Police Officers must forcibly enter the home of a citizen before it may successfully contended that their entry into his home is unlawful. The doctrines of the Fourth Amendment "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking in of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his

indefeasable right of personal security, personal liberty and private property . . . ." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).*

(2) Aside from Police Officer Sherman's bare assertion, based upon no foundation evidence, that Twillie paid rent to Petitioner and his further bare assertion that Twillie's bedroom was off the hallway, the only testimony prior to the denial of the motion to suppress, tending to support the conclusion of the Illinois Supreme Court that Twillie was a tenant of Petitioner, is the hearsay testimony of the same Police Officer that Twillie had told him that he resided in the apartment. No evidence was offered by the State to establish a right in Twillie to permit the entry of Police Officers into the Petitioner's apartment.

There is absolutely no evidence, prior to the denial of the Motion to Suppress, that the room in which the adding machine was found was a "room of common usage", as it is characterized by the Supreme Court of Illinois. There is absolutely no evidence that Twillie had any right to enter the said room, or any right to possession of same, either alone or with Petitioner. The Illinois Supreme Court cited *People* v. *Perroni*, 14 Ill. 2d 581, 153 N.E. 2d 578, As authority for the proposition that "where two persons have equal rights to use and occupation of premises, either may give consent to a search and the evidence thus disclosed can be used against either." So is the holding of *Perroni*, but it is potently clear that *Perroni* is not applicable to the case at bar. There is no evidence here that Twillie had equal right with petitioner to use and

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* Cited and quoted with approval in *Mapp* v. *Ohio*, 367 U.S. 643, 646 (1961).

occupation of the room where the challenged evidence was found, nor is there evidence that Twillie consented to a search of the apartment.

We urge upon this Court that the entry of the Police Officers, even if Twillie had authority to allow strangers into the apartment, was accomplished with the aid of the showing of their authority and implied force. They identified themselves with stars and two were in uniform and Fleming, who had just left the apartment, was in their custody. When Fleming called to Twillie he did not say "open up, Police Officers want to come in." He only told Twillie to open the door and, upon doing so, Twillie was confronted by a number of Police officers of the City of Chicago. The Officers did not tell Twillie that they desired to search the apartment, or that they were seeking evidence. Neither did Twillie tell the officers they could search the apartment and seize things therefrom. It is not realistic to expect an unsuspecting citizen to seek to bar police officers at the door of his home, who in uniform and presumably armed, say to him "do we have permission to come in." The show of authority renders the request to enter a directive or a command and the fear of authority and arms would impel the average citizen to permit the entry even against his will but above and beyond this the machine in the living room was in a bag. The Officers searched the bag which was in effect in Petitioner's home and found and seized the machine. There is not a scintilla of evidence up to the denial of the Motion to Suppress Evidence, to support any reasonable belief on the part of the Police Officers that that adding machine was the fruit of any crime known to them to have been committed. They suspected a burglary had been committed by Yancey, but there is no testimony or other evidence (prior to

added the fact that no reason appears in the record for the failure of the police officers to have obtained a warrant authorizes the search of petitioner's home. Certiorari is commanded in this case and reversal of the Illinois Supreme Court and the Cook County Criminal Court is required.

"It is respectfully suggested that the inconsistent pronouncements of this Court of what significance should be attached to the failure of officers to obtain a warrant to enter and search the home of a citizen, where it appears that they had time to obtain one, has left judicial officers of the State of Illinois and other states in a state of confusion and uncertainty. In Volume III, Number 1, University of Pennsylvania Law Review (November, 1962, at page 21, the Honorable Arlen Specter, Chief of the Appeals Division of the office of the District Attorney of Philadelphia County, Pennsylvania, writes of this confusion and uncertainty as follows:

> "In evaluating the reasonableness of a search and seizure without a warrant, courts have attached some significance to the time the officer had to secure a warrant. Pennsylvania judges, however, are divided as to whether failure to obtain a warrant when there was time to do so vitiates an otherwise valid seizure. Considering the vacillation of the Supreme Court of the United States on this point, it is not surprising that Pennsylvania courts have not been in agreement. In *Trupiano* v. *United States*,* the Supreme Court held that a valid arrest did not in itself justify a search without a warrant; the prosecution had to show that under the circumstances it was unreasonable or impracticable to require the arresting officer to obtain a warrant. Two years later, however, 'in

* 334 U.S. 699 (1948).

United States v. *Rabinowitz*,** the Court ruled that the officers were not bound to obtain a search warrant even if there was time, if the seizure was otherwise reasonable. To allay any doubt of the effect of that holding on *Trupiano*, the Court expressly stated:

> To the extent that *Trupiano* v. *United States*, 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled.

Such an express ruling on a controversial question should have resolved the issue, but in 1961 the Supreme Court may have revived the *Trupiano* dictum in *Chapman* v. *United States*,*** in which it stated:

> Here, as in that case, "no reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly not enough to bypass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear."

In support of *Chapman* cited in the above quotation we show that before *Trupiano* and *Rabinowitz* and *Chapman*, this Court said in *Johnson* v. *United States*, 333 U.S. 10, 68 S. Ct. 367, 369:

> "There are exceptional circumstances in which, on balancing the need for effective law enforcement

** 339 U.S. 56 (1950).

*** 365 U.S. 610 (1961).

against the right or privacy it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle."

It seems that this Court in *Chapman* ignored or by implication overruled *Rabinowitz* and followed *Johnson* letter for letter. The courts of States of Illinois and of Pennsylvania and all other states need clarification of the position of this Court. While considering the need for such clarification we call attention to the words of this Court in *Agnello, et al v. United States*, 269 U.S. 20, 46 S. Ct. 4, 6:

"That the protection of the Fourth Amendment extends to all equally, to those justly suspected or accused as well as to the innocent. The search of a private dwelling without a warrant is, in itself unreasonable and abhorrent to our laws."

Also in this connection we beseech this Court to consider its words in *United States* v. *Lefkowitz*, 285 U.S. 452, 464, 52 S. Ct. 420, 423:

"• • • Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. • • •"

2.

We raise the question of whether or not the due process clause of the Fourteenth Amendment to the United States Constitution grants to this Court the Power to:

(1) Strike down the rule of the Illinois Supreme Court that a Defendant in a criminal case can be lawfully convicted upon the uncorroborated testimony of an alleged accomplice for the reason that a conviction based solely upon such evidence is necessarily so unfairly arrived at that it may be said that trial in such case lacks the fundamental fairness required by the said Fourteenth Amendment.

(2) Strike down the holding in the case at Bar, that petitioner's conviction of burglary is sustained by evidence excluding all reasonable doubt of his guilt, the said evidence consisting solely of the uncorroborated testimony of an accomplice witness where that witness is a narcotic addict, a convicted felon, a perjurer afflicted with anger toward the petitioner, and where his testimony against the Defendant is completely and effectively contradicted by the testimony of another alleged accomplice of petitioner, and where petitioner and a witness for him, corroborated by another witness, gave unimpeached testimony that he was at another place at the time the crime was committed, which testimony is contradicted nowhere in the Record except by the aforesaid uncorroborated and contradicted testimony of that one accomplice witness, who testified against him—and where to this is added the trial Judge's elicitation of testimony from the said accomplice witness of alleged prior criminal transactions between himself and petitioner.

The Illinois Supreme Court, at one place in its opinion in this case, states that the testimony of accomplice witness Yancey, described by the Court as a convicted felon and narcotic addict is competent and may be sufficient, even though uncorroborated, to sustain the conviction of Petitioner if "the trier of fact is convinced of guilt beyond a reasonable doubt". At this point we show the Court that not a scintilla of evidence appears in the entire record tending to establish the guilt of Petitioner of burglary other than the uncorroborated testimony of Yancey. When Petitioner's Attorney argued for acquittal at the time the State's Attorney said "That is the State's case." (Tr. Ct. Rec. 177), and urged that the only evidence against Petitioner was the testimony of Yancey, the trial court suggested as follows: "Isn't there some evidence of recent possession? Isn't that right"? The Supreme Court of Illinois said in its opinion that "there was a connected chain of testimony from the State's witness as to the machines found in Yancey's possession and the machine found in Defendant's possession". The record in the case does not sustain either the suggestion of the trial court or the statement of the Supreme Court. There is no evidence in the Record that the machine found in Petitioner's apartment was one of the machines allegedly taken by Yancey during the burglary of the Monroe Calculating Machine Company. There is no evidence in the Record of where this machine came from, when or in what manner it reached Petitioner's living room, and, in fact, no testimony in the entire Record that this machine was the property of the said Company. So, the testimony of Yancey stands completely and totally uncorroborated by any other evidence in the Record. In *People v. Hermens*, 5 Ill. 2d 277, 125 N.E. 2d 500 (1955), the Illinois Supreme Court stated the Illinois position, and discussed the opposite position of courts in other jurisdictions as to the sufficiency of uncorroborated testimony of

an alleged accomplice to sustain a conviction in a criminal case. The Court in *Herrera* said:

> "At common law the uncorroborated testimony of an alleged accomplice was sufficient to warrant a conviction if it satisfied the jury beyond a reasonable doubt. This rule has always been followed and has frequently been pronounced in Illinois. *People* v. *Dabbs*, 370 Ill. 378, 19 N.E. 2d 175; *People* v. *Cohen*, 376 Ill. 382, 33 N.E. 2d 593; and see numerous citations, 22 C.J.S., Criminal, Section 810, p. 1389. It is, however, universally recognized that such testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution, which must always be taken into consideration. Some jurisdictions attach such weight to these weaknesses that the rule has been abrogated by statute, 22 C.J.S., Criminal Law section 810, p. 1391, while those jurisdictions which follow the rule, recognizing the questionable character of such testimony, attempt to restrict the weight to be given to it by statements that it is not regarded with favor, is discredited by the law, should be weighted with care, is subject to grave suspicion, should be viewed with distrust, and that it should be scrutinized carefully and acted upon with caution. *People* v. *Gleitsmann*, 361 Ill. 165, 197 N.E. 557; *People* v. *De Rose*, 359 Ill. 512, 195 N.E. 1; *People* v. *Kendall*, 357 Ill. 448, 192 N.E. 378; *People* v. *La Coco*, 406 Ill. 303, 94 N.E. 2d 178. Other similar statements by this Court are too numerous to be cited. As pointed out by the Illinois Court some jurisdictions have concluded that the uncorroborated testimony of an alleged accomplice is so untrustworthy that it can never be held sufficient to sustain a conviction in a criminal case."

The Illinois Supreme Court though making strong pronouncements, as shown in *Herrera*, that such evidence is inherently weak and untrustworthy, continues to hold that such evidence may be sufficient if believed by the

trial court. We urge that in no conceivable criminal case can it be said that a Defendant has been fairly convicted where the only evidence against him is the uncorroborated testimony of an alleged accomplice who has confessed the crime charged. If such evidence is weak, untrustworthy and subject to grave suspicion, then how can it be said that it alone can establish guilt beyond a reasonable doubt.*

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* Some opinions in courts of other jurisdictions holding that uncorroborated testimony of an alleged accomplice cannot sustain a conviction in a criminal case are as follows:

Alabama—*Doss* v. *State*, 22a Ala. 30, 123 So. 231
Arizona—*Leviston* v. *State*, 23 Ariz. 482, 205 P. 321
Arkansas—*Knowles* v. *State*, 113 Ark. 257, 168 S.W. 148
California—*Hotaling* v. *Superior Ct.*, 191 Cal. 501, 217 P. 73
Iowa—*State* v. *Chauvet*, 111 Iowa 687, 83 N.W. 717
Kentucky—*Levering* v. *Com.*, 132 Ky. 666, 117 S.W. 253
Minnesota—*State* v. *Sweeney*, 180 Minn. 450, 231 N.W. 225
Montana—*State* v. *Yegen*, 86 Mont. 251, 283 P. 210
Nevada—*State* v. *Douglas*, 26 Nev. 196, 65 P. 802
North Dakota—*State* v. *Kelly*, 8 N.D. 563, 80 N.W. 476
Oklahoma—*Cudjoe* v. *State*, 12 Okla. Crim. Rep. 246, 154 P. 500
Oregon—*State* v. *Start*, 65 Or. 178, 132 P. 512
South Dakota—*State* v. *Phillips*, 18 S.D. 1, 98 N.W. 171
Tennessee—*Skelly* v. *State*, 95 Tenn. 152, 33 S.W. 492
Texas—*Thorp* v. *State*, 59 Tex. Crim. Rep. 517, 129 S.W. 607
Utah—*State* v. *Bowman*, 92 Utah 540, 70 P. 2d 458
Washington—*State* v. *Clark*, 156 Wash. 47, 286 P. 69

In the case at Bar, not only is the testimony of accomplice witness Yancey uncorroborated, but his testimony is otherwise unsatisfactory. His first testimony is that about Two O'clock in the morning on August 1, 1960, Petitioner first talked to him about getting some adding machines, and had told him that he could get some at Monroe Adding Machine Company, and that the door was open. Petitioner thereupon drove him to the Company where Yancey committed the burglary on that early morning of August 1, 1960. His later testimony is that on July 31st, he, Yancey, had gone to the premises of Monroe Calculating Company alone and "cased the joint". Upon realizing this contradiction he sought to explain it by testifying that it was in the day time on the first of August, that Petitioner first talked to him about machines and that he then went alone to Monroe Calculating Company for the first time. Thus his explanation was that his visit to look over the premises of Monroe Calculating Machine Company occurred after the burglary was committed. This testimony is patent perjury. But there is more. Yancey in explaining why he became angry with Petitioner, and why he kept three adding machines for himself said that he was supposed to get $500.00 the next day after the burglary, but didn't get it. Thus the retention of the three adding machines and his anger occurred before the cause of the retention and anger had had an opportunity to exist. This testimony is unreasonable and unbelievable. Next Yancey testified that at his own trial before another Judge for the theft of the machines, he testified that he had possession of four machines in the taxicab at the time of his arrest, not three as he testified in the case at bar. Although Yancey was not released from custody from the time of his arrest until he began serving his sentence from one year to thirteen months, and although he testified he had not seen the Petitioner from the time of his own arrest until the day he testified against Petitioner in the

instant proceeding, he had nevertheless asked Petitioner after his arrest for the $500.00 due him. This is impossible. The Illinois Supreme Court, then, has upheld a conviction of Petitioner, not only on the uncorroborated testimony of an alleged accomplice, but upon perjured testimony of the said accomplice, and upon unreasonable and impossible testimony of the said accomplice; and where the accomplice admitted anger toward the Petitioner (part of which anger he admitted was caused by the fact that Petitioner allegedly did not send a lawyer to aid him), the accomplice being a confessed and convicted felon, who had been in and out of jail for a long period of time for various offenses, and who was addicted to the use of narcotic drugs.

The Illinois Supreme Court, however, holds that if trial Judge believed Yancey in spite of all these defects in his uncorroborated testimony against Petitioner then it would not substitute its judgment for that of the trial court. It is respectfully submitted that a proper function of the Illinois Supreme Court, on review of a case, is to substitute its considered judgment, arrived at in an atmosphere of detached reflection, for that of the trial court, where it is obvious that the judgment of the trial court is not and cannot be sustained by the evidence and where there necessarily exists a reasonable doubt of a Defendant's guilt as in the case at Bar. We respectfully show that in the case of *Adamson* v. *People of California*, 332 U.S. 46, 67 S. Ct. 1672, this Court discussed its power granted by the Constitution to exercise its judgment pursuant to the Fourteenth Amendment on the whole course of proceedings in State criminal trials. This Court in *Adamson* said:

> "And so, when, as in the case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provi-

> sions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

This Court said in *Lisenba v. Oklahoma* 64 S. Ct. 1208, 322 U.S. 596, 605.

> "The Fourteenth Amendment is a protection against criminal trials in State courts conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice and in a way that necessarily prevents a fair trial."

The Illinois Supreme Court has, by necessary implication, said in this case, that no matter how bad the judgment of a trial court may be, if there was no jury, it will not reverse that judgment. This cannot be, and we ask this Court to grant Certiorari and to rule either that no person may be convicted in a criminal case solely upon uncorroborated testimony of an alleged accomplice, or, if this Court should consider that such rule would be too broad, or unwise for some other reason, then this Court should reverse the conviction in the case at bar, it being uncorroborated testimony of accomplice and it being untrustworthy, unreasonable, contradictory, impossible and patently perjured. We urge that this Court exercise its power under and pursuant to the Fourteenth Amendment of the United

States Constitution to nullify unreasonable judgments entered by Courts in State criminal proceedings.

In *Thompson v. Louisville*, 80 S. Ct. 624, 362 U.S. 199 this Court exercised its power under the Fourteenth Amendment to judge the quality of evidence presented in the court below. In that case this Court said:

> "Just as a conviction on a charge not made would be sheer denial of due process; so it is a violation of due process to convict and punish a man without evidence of his guilt."

If this Court should deem the unfairness already shown herein to be insufficient to constitute a denial of the due process guaranteed by the Fourteenth Amendment, then we ask the Court to consider the following in addition thereto:

During the course of the trial Petitioner's counsel asked the witness Yancey why he trusted Petitioner for the $500.00 he was supposed to be paid for the machines. The witness testified that he had been doing business with Petitioner for four years. When Petitioner's counsel had finished cross examining Yancey, the trial court asked the witness what was the business he had done with Petitioner during these four years. Petitioner answered that he had bought all kinds of hot merchandise, coats, cameras and every thing he could get (Tr. Ct. Rec. 122). The Illinois Supreme Court has consistently held that, with certain exceptions, proof of other crimes will undoubtedly prejudice the minds of the trier of facts against the Defendant in the case on trial. In *People v. Deal*, 357 Ill. 634, 641 the Illinois Supreme Court held that the general rule is that evidence that a Defendant has committed another crime, wholly independent of or discriminate from the one for which he

is being tried, is not admissible. Other cases in Illinois pronouncing the same rule are as follows:

People v. *Brown*, 355 Ill. 348;
People v. *Allen*, 321 Ill. 11;
People v. *Scott*, 319 Ill. 359;
People v. *Cassler*, 332 Ill. 207;
People v. *King*, 276 Ill. 138;
People v. *Gibson*, 255 Ill. 302

Although the Illinois Supreme Court recognizes that the trial judge's examination of Yancey, and Yancey's answers were prejudicial and unfair to Petitioner, it states "These matters which related to dealings in 'hot merchandise' were first elicited by Defendant, in his cross examination of Yancey, and Defendant developed that Yancey 'had done business with Palmer for four years.'" The Court misapprehended the Record on this point. Petitioner's attorney did not ask Yancey how long he had done business with Petitioner but Yancey volunteered that he had been doing business with Petitioner for four years while explaining to Petitioner's attorney and the Court why he had trusted Petitioner for his $500.00. It is not true that Petitioner's Attorney elicited any testimony from Yancey about dealings in hot merchandise. He did not ask Yancey what kind of business he had been doing with Petitioner, and the kind of business he had been doing was clearly immaterial. It was the Judge who asked Yancey what kind of business he had been doing with Petitioner, and it was the Judge who elicited the testimony of Yancey about his buying the hot merchandise, coats, cameras, etc. (Tr. Ct. Rec. 122). The Supreme Court of Illinois noted the fact that the Defendant's attorney did not object to the Judge's examination with a suggestion that for this reason he could not complain. An objection by a party to questions put is usually an objection to a question put by an opposing party and the

Judge is charged with the duty to sustain or overrule the objection. If the Judge overrules the objection then the answer to the question is received and presumably considered by the Court. What purpose could be served by an objection to a question put by the Judge whose office it is to rule upon the objection and to decide whether the question is properly put and whether it may be answered. If the Judge asks the question, the Judge has himself decided and indicated that the question is proper in his opinion. It cannot therefore be said that a failure on the part of a defendant to object to a question put by the Judge is a waiver of his objection thereto. It would seem that the purpose of any rule that the failure to object to a question put by another party waives the objection, is to prevent a party from agreeing at the time of the question that the Judge need not rule on its propriety, then to later charge that the Judge erroneously so omitted it. This would be unfair to the Court and the opposing party. Such is not the case here. We can not comprehend that the Illinois Supreme Court believed that the State's attorney's subsequent questions objected to by the Petitioner about the business Yancey had done with Petitioner, and whether or not he had occasion to give him merchandise in exchange for money would not suggest that Petitioner had been engaged in illegal activity with Yancey, if it took into consideration the Judge's own examination of Yancey discussed above. The trial of Petitioner already shown to have been unfair was made further unfair by this unnecessary and exploratory elicitation of evidence of other crimes allegedly committed by Petitioner and the testifying accomplice.

But there is more unfairness in the record. Ricardo Freeman, whom Yancey at one time said was in the burglary with him "all the way", and whom he later testified only helped him and Petitioner to remove the stolen mer-

chandise from Petitioner's automobile and place them in Petitioner's apartment, and who had pleaded guilty before another Judge to a charge of petty larceny or petty receiving, because of his moving of one of the machines, testified that Petitioner was not present when Yancey came to his house a few doors from Petitioner's home and asked him to assist him in moving seven or eight machines from a taxi cab. Note that he testified he moved a machine from a taxi not from petitioner's automobile. So one alleged accomplice incriminates Petitioner, and one alleged accomplice exonerates him. How can it be said under these circumstances that all reasonable doubt of Petitioner's guilt has been excluded. When we add to this the fact that Petitioner denied the charge and was not impeached in any manner whatsoever, and that he gave testimony that he was in Idlewild, Michigan, and not in Chicago from the Thursday before August 1st until the 3rd day of August, 1960, and that he was corroborated on this respect by a witness, Shirley Clinton, who was also unimpeached in any manner, can it be said that the course of the proceedings in the trial court in this case do not offend those canons of decency and fairness which express the notions of justice of English speaking people.

We remind this Court of its words in *Idaho v. California*, 332 U.S. 46, 67 S. Ct. 1682 "Those standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia". We suggest to this Court that as in *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, the case at bar presents a serious question.

> "As to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the states."

In this case Petitioner was not treated fairly in the trial court and when he sought review in the Illinois Supreme

Court was treated more unfairly. The language of the Supreme Court suggests, in fact, that Petitioner has no right of review of his claim of unfair treatment in the trial court, and we pray that this Court as the Court of very last resort will exercise its power under the Fourteenth Amendment to review the judgment of the Supreme Court of Illinois and that of the trial court in this cause.

3.

We have shown in our narration of the manner in which the federal questions were raised in this cause, that the question of whether or not petitioner was in fact tried in the trial court was not directly raised either in trial court or the Supreme Court of Illinois, but that the question is necessarily incidental to the question of the propriety of the trial court's denial of Petitioner's motion to suppress evidence, and the Supreme Court's affirmance of that denial. In the first part of our argument herein, we have shown that on January 19, 1962, the trial court ordered proceedings to begin on the Petitioner's preliminary motion to suppress evidence, and the hearing was begun. At the close of that day the trial court entered an Order continuing the motion to suppress evidence to another date. On the second day of proceedings the trial court asked if "We are proceeding on the motion to suppress, is that it?" (Tr. Ct. Rec. 138) The State's Attorney said "Both, trying it at the same time." Up to that very point there is no question that all of the evidence taken in the case was on the hearing of the Motion to Suppress Evidence. Nowhere in the record on that first day of trial was there an agreement that the preliminary motion to suppress evidence and the trial should proceed together. On the second day of the proceedings, if it can be said that because of the State's Attorney's statement to the Court that they were proceeding both on the trial and motion at the same time, the trial and motion proceeded to-

gether on that day, then the evidence for the State taken on that day is clearly insufficient to sustain the charge of burglary against the Petitioner. No evidence offered and received on Petitioner's behalf ends the State's case. On the second day of proceedings Yancey merely testified to a description of Petitioner's bedroom, but did not testify that Monroe Calculating Machine Company had been burglarized or that Petitioner had assisted him in the burglary of Monroe Calculating Company as charged in the indictment. On that second day of proceedings Police Officer Sherman testified merely to a description of Petitioner's apartment and other facts concerning his questioning of the arrested persons (not including petitioner) and his entry into Petitioner's apartment, etc. Under the circumstances there appears little question that Petitioner has not been accorded a fair trial as the same is generally interpreted in the United States, and that the trial was so unfair, and so inept and unfairly conducted that it amounted to no trial at all.

Respectfully submitted,

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APPENDIX 1

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket No. 37287 Agenda 33 September, 1962

The People of the State of Illinois, Defendant in Error

vs.

L. C. Palmer, Plaintiff in Error.

Mr. Justice Underwood delivered the opinion of the court:

Defendant, L. C. Palmer, otherwise called Henry Palmer and Andrew Clinton, was indicted by the Cook County grand jury for the crimes of burglary and receiving and concealing stolen property. He was tried by the court without a jury, found guilty of burglary, and was sentenced to a term of from 1 to 4 years in the Illinois State Penitentiary.

By writ of error defendant seeks reversal, and assigns as error that the evidence was wholly insufficient to support the finding and judgment of the court, and that there was a fatal variance between the indictment and the proof. Alternatively, he seeks a new trial because of numerous errors allegedly occurring at the trial.

The alleged burglary took place on August 1, 1960, at the premises of the Monroe Calculating Machine Company, Inc., at 1130 South Michigan Avenue in the city of Chicago. The only evidence placing the defendant at or near

the scene of the alleged burglary was the testimony of one Nathaniel Yancey who was indicted with the defendant and prior to this trial had pleaded guilty and been sentenced to the Illinois State Penitentiary where he was confined at the time of his testimony in this case. Yancey identified the defendant and testified that he had known him under the name of L. C. Palmer for about 4 years. On August 1, 1960, he saw the defendant at the defendant's home and at the suggestion of Palmer, Yancey went with him in Palmer's car to the Monroe office. This was then about 2:00 A.M. on August 2. Defendant parked his car in an alley behind the office and Yancey went in through an open door and got 20 adding machines which he put in the trunk and on the seats of the defendant's car. At some point prior to this, although the record is unclear as to the precise time, Palmer had agreed to pay Yancey $500 for his part in the activities. This was denied by Palmer. No money was ever paid. The defendant stayed in the car, according to Yancey, and they then drove back to defendant's apartment. Defendant went in and got one Riccardo Freeman who was also indicted with Yancey and Palmer, and the three of them carried the machines into the apartment excepting for 4 machines which Yancey took with him in a taxicab and had with him at the time of his arrest. The officer who arrested Yancey about 2:30 A.M. on August 2, testified that there were 4 adding machines on the floor of the cab, and these machines were subsequently identified by the office manager of Monroe as machines taken from the Monroe Company. About 1:30 on the morning of August 3 the arresting officer together with three other officers went to the apartment of the defendant and knocked for admission. When no one came, they went back into

the street and saw lights in the apartment, and Freeman, who was known to the police and Yancey as Fleming, left the entrance of the apartment building and told the police that he had come from Palmer's apartment. Fleming then called one Twillie to let the police in and Twillie did admit them to the apartment where the police found in the living room an adding machine in a paper bag which was later identified as the property of the company. The evidence indicated that Twillie, who testified for the defendant, shared the apartment with the defendant and had shared other apartments with him. The office manager of Monroe identified the 4 machines found in the possession of Yancey and the 1 machine found in defendant's possession as being the property of the Monroe Company.

The defendant testified in his own behalf and testified that his name was L. C. Fingers and that he had never gone under the name of Palmer and that he had left Chicago prior to August 1 to go to Idlewild, Michigan, with his girlfriend, Shirley Clinton, and returned to Chicago on August 3 and then left in September to go to visit his father in Missouri and stayed there until December 1, 1960. About December 13 or 14 his attorney left a message that he was wanted by the police and he went to the Hyde Park police station and surrendered himself. He denied that he ever went anywhere with Yancey, and particularly denied going to the Monroe office or taking any machines or helping Yancey unload machines and that there was no adding machine in his apartment on August 1 or any other time. Shirley Clinton, defendant's girl friend, testified that she met the defendant on July 29 at Idlewild, Michigan, and that they returned on August 3; that she

had known the defendant under the name of L. C. Fingers for 5 years. Riccardo Freeman testified that he met Yancey at his apartment about a block from the defendant's apartment on August 1, and Yancey had asked him to come down to the alley and help him move some machines. Freeman went with him and took a machine into the stairway to the back of where defendant lived. This apparently was the machine which the officers found in the apartment. He denied having anything to do with the burglary.

Herman Twillie testified that he had never seen Yancey at Fingers' home, that he knew no L. C. Palmer but he knew a Henry Palmer and that Fingers was not in the apartment on either August 1 or August 2. He rented his bedroom from Fingers and paid him rent for it.

As to defendant's contention that there was a fatal variance between the allegations and the proof, we note that defendant was indicted under the name of L. C. Palmer, otherwise called Henry Palmer, otherwise called Andrew Clinton. There was no testimony excepting that of Yancey that defendant was known as L. C. Palmer. Throughout defendant's testimony he maintained that he was L. C. Fingers and not L. C. Palmer. Defendant argues that he cannot be indicted under one name and convicted under another name and states that his counsel said nothing and did nothing to warrant the trial court in deciding that this point had been waived. We do not agree. The record indicates that at the arraignment on January 5, 1961, his counsel stated "This is the case of Mr. L. C. Palmer who is also called L. C. Fingers, Indictment No. 60-2604." On that day defendant's attorney entered his written appearance for L. C. Palmer. In *People* v. *Goldberg*, 287 Ill.

238, 244, we held that on a motion in arrest of judgment the defect of a misnomer could be reached since that motion opened up the entire record for examination and reaches any defect apparent therein. In that case defendant had entered his plea of not guilty under his correct name of Philip Goldberg, whereas in two of the fifty counts in the indictment he was referred to as Philup Goldberg or Philip Holdberg. However, in this case defendant's counsel appeared on behalf of L. C. Palmer and pleaded not guilty for L. C. Palmer. Thus the defendant falls squarely within the doctrine of *People* v. *Houser*, 210 Ill. 253, 268, where we held that where the defendant did not, by any plea, urge that his name was not correctly stated in the indictment, he was estopped to deny that he was correctly named therein.

While the evidence linking defendant to the scene of the crime is the testimony of his accomplice, Yancey, a convicted felon and a narcotics addict, nevertheless such evidence is competent, even without corroboration, and we have repeatedly held that a conviction can be sustained by the uncorroborated testimony of an accomplice if the trier of fact is convinced of guilt beyond a reasonable doubt. *People* v. *Flaherty*, 396 Ill. 304, 314; *People* v. *Leslie*, 18 Ill. 2d 420, 424.

This court will not substitute its judgment on the matter of credibility of witnesses and the weight to be given their testimony where the trial judge saw and heard them testify, unless we can say the proof was so unsatisfactory as to justify a reasonable doubt as to defendant's guilt. *People* v. *Mack*, 25 Ill. 2d 416, 422; *People* v. *Dillon*, 24 Ill. 2d 122.

(Opinion of the Supreme Court of Illinois)

Defendant alternatively seeks a new trial because of the court's refusal to allow the motion to suppress the evidence. The hearing on the motion to suppress proceeded along with the bench trial and was based upon the allegedly improper search of defendant's home without his consent and without any reasonable grounds to believe defendant had committed any crime, no crime having been committed in the presence of the searching officers. The testimony of the searching officers who had arrested Yancey the preceding day established that there was no breaking into the apartment. The search party was admitted by Twillie, a tenant of defendant, and the adding machine was found in the living room, a room of common usage. In *People* v. *Perroni*, 14 Ill. 2d 581, 590, we said "the rule seems to be well established that where two persons have equal rights to the use or occupation of premises, either may give consent to a search and the evidence thus disclosed can be used against either." We hold the motion to suppress was properly overruled.

Defendant also complains of certain interrogation of witnesses by the court, the inquiry by the court and prosecutor regarding crimes unrelated to the crime charged in the indictment, and certain rulings on the admissibility of evidence. We have examined the record, in the light of these assignments of error, and are constrained to observe that defendant's claim that these matters prejudiced him at the trial assumes that what might prejudice a jury need also prejudice the trial judge. Where the judge is the trier of facts, his interrogation of witnesses to clear up points insufficiently developed by counsel is proper where such interrogation is related to the issues involved.

(Opinion of the Supreme Court of Illinois)

This is discretionary with the court, and the record here shows no abuse of that discretion.

Defendant's claim that the prosecutor and the judge improperly inquired as to other crimes unrelated to the crime charged in the indictment is without merit. These matters which related to dealings in "hot merchandise" were first elicited by defendant in his cross examination of Yancey, and defendant developed that Yancey had done business with Palmer for four years. Any unfavorable inferences resulted from defendant's questioning, and he cannot complain. At the conclusion of defendant's cross-examination, the court asked Yancey four questions relating to his business dealings over four years, and no objection was made by defendant. When Yancey was recalled by the State, he was asked on direct examination "You also testified previously that you had known you had done business with L. C. Palmer many times before, is that right?" No objection was made either to the question or the affirmative answer. When the prosecutor then asked "How many times, if you know?", defendant objected that this was an attempt to show other illegal acts. The court sustained the objection. Later, Yancey testified to doing business for three years with defendant, giving him merchandise and receiving money. Nothing in either of these latter questions or answers indicated any illegality in the transactions, and they were properly before the court on the issue developed by defendant as to acquaintance between Yancey and Palmer.

As to the contention that reversible error was committed by the admission of hearsay testimony and the undue restriction of defense counsel in his attempt to attack

(Opinion of the Supreme Court of Illinois)

Yancey's credibility, we hold the admission of testimony of a telephone conversation between the manager of Monroe and the police officer who arrested Yancey relating to the serial numbers of the machines was improper, but not reversible error, since we presume the court considered only the competent evidence, and the manager subsequently personally identified the machines at the police station. (*People* v. *Cox*, 22 Ill. 2d 534; *People* v. *Richardson*, 17 Ill. 2d 253.) We find nothing in the record to substantiate the contention that defendant's counsel was unduly restricted in his cross examination of Yancey.

Defendant points out that the adding machines were not produced at the trial and argues that this omission requires reversal. There was a connected chain of testimony from the State's witnesses as to the machines found in Yancey's possession and the machine found in defendant's possession. No further proof of specific items taken is necessary to support a conviction for burglary, as the gist of the offense is the entry of a building with felonious intent. (*People* v. *Urbana*, 18 Ill. 2d 81, 93), and when that entry and intent are shown, proof of the specific items taken is not essential. *People* v. *Iannacco*, 11 Ill. 2d 55.

From an examination of the entire record, we find that the defendant received a fair trial and was properly convicted of burglary. Accordingly the judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

APPENDIX 2

JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY

And afterwards, to-wit: on the third day of February in the year last aforesaid, it being the term of Court aforesaid, there being present Honorable Richard B. Austin, Judge of the Superior Court of Cook County, Illinois, and Ex-Officio Judge of the Criminal Court of Cook County, Illinois.

Daniel P. Ward, State's Attorney,
Frank G. Sain, Sheriff, and
John J. Altman, Clerk.

The following among other proceedings were had and entered of records in said court, which said proceedings are in words and figures following to-wit:

The People of the State of Illinois	
vs.	**Indictment for Burglary, etc.**
I. C. Palmer, otherwise called Henry Palmer otherwise called Andrew Clinton (Impleaded)	**Gen. No. 60-2604**

This day come the said People by Daniel P. Ward, State's Attorney and the said defendant as well in his own proper person as by his Counsel also comes.

And the Court hearing the further testimony of witnesses.

And the Court hearing the arguments of Counsel

(Judgment of the Criminal Court of Cook County)

And the Court being fully advised in the premises, doth find the said Defendant Guilty of burglary in manner and form as charged in the indictment in this cause.

Counsel for said Defendant now here moves the Court for New Trial in the above entitled cause.

And the Court hearing Counsel for said Defendant in support of said motion as well as the State's Attorney Counsel for the People in opposition thereto and being fully advised in the premises, doth Overrule said motion and orders that said motion be and the same is hereby Overruled accordingly.

Counsel for said Defendant now here moves the Court in arrest of Judgment in the above entitled cause.

And the Court hearing Counsel for said Defendant in support of said motion as well as the State's Attorney Counsel for the People in opposition thereto and being fully advised in the premises, doth Overrule said motion and orders that said motion be and the same is hereby Overruled accordingly.

And now neither the said Defendant nor his Counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the finding of guilty, heretofore entered and the judgment rendered to the indictment in this cause.

Therefore, it is considered, ordered and adjudged by the Court that the said Defendant L. C. Palmer is guilty of the said crime of burglary in manner and form as charged in the indictment in this cause, on the said finding of guilty.

(Judgment of the Criminal Court of Cook County)

Therefore, it is ordered and adjudged by the Court that the said Defendant L. C. Palmer be and he hereby is sentenced to the Illinois State Penitentiary for the crime of burglary in manner and form as charged in the indictment whereof he stands convicted, for a term of years not less than one (1) year, nor more than four (4) years, for the crime for which the said defendant was convicted and sentenced.

It Is Further Ordered that the said Defendant pay all the cost of these proceedings, and that execution issue therefor.